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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5175

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ORIGINAL COPY

RANDALL DALE ADAMS,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent in the above entitled and numbered cause, and by and through the attorney of record, the Attorney General of Texas, Mark White, files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Adams v. State, 577 S.W.2d 717 (Tex.Crim.App. 1979).

JURISDICTION

Petitioner is seeking to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the exclusion of certain prospeqtive jurors violated the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968).

II. Whether the use of psychiatric testimony during the punishment phase of the trial constituted competent evidence within the meaning of the due process clause.

III. Whether the failure to disclose a prior written statement on identification to Petitioner violated his rights under Brady v. Maryland, 373 U.S. 83 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

1. UNITED STATES CONST., AMEND. VI.
2. UNITED STATES CONST., AMEND. VIII.
3. UNITED STATES CONST., AMEND. XIV.

STATEMENT OF THE CASE

Petitioner was indicted and convicted in Dallas County, Texas, for the capital murder of a peace officer in the lawful discharge of his duties. The offense was alleged to have been committed on November 28, 1976. Petitioner was arrested on December 21, 1976. The indictment was returned on February 21, 1977, by the Dallas County grand jury. Jury selection began on March 28, 1977, and the verdict was returned on May 3, 1977. Petitioner filed a motion for new trial which was overruled by the trial court on May 20, 1977. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals on January 31, 1979. Petitioner's motion for leave to file motion for rehearing was denied on March 21, 1979.

The evidence introduced at trial showed the following sequence of events. In the early morning hours of November 28, 1976, Officers Robert Wood and Teresa Turko were on routine patrol. Both were in police uniform and in a police marked patrol car. Wood, the deceased, was driving the vehicle. Wood and Turko observed a small car driving without headlights. The car was one which had been stolen previously by David Harris. It was being driven by Petitioner. David Harris was slumped down on the passenger's side of the front seat so that he could not be seen from the outside of the car.

After stopping the car, Wood with a flashlight in hand, approached the driver's side of the car. Turko stationed

herself by the right rear fender of the car. When Wood reached the driver's side of the car Turko heard Wood say, "Oh, my gosh" then she heard a volley of gunshots. Officer Wood was killed instantly and fell to the ground. The car driven by Petitioner sped away in a barrage of gun fire from Officer Turko.

Officer Turko could not identify the driver of the vehicle but was able to give a description based on her observation of the back of his head and coat collar. That description was compatable with that of Petitioner. She testified that the driver of the car could not have been David Harris.

Michael Randall drove by the scene when the car had been stopped by the police but the officers had not yet approached the driver. Randall positively identified Petitioner as being behind the wheel of the stopped car.

Emily Miller and her husband R. L. Miller, also drove past the scene. They observed both stopped cars and saw the deceased, whom they knew, get out of the patrol car. After passing by the Millers heard what they thought might have been shots. Both Mr. and Mrs. Miller positively identified Petitioner as being the driver of the stopped car.

The autopsy revealed that Officer Wood sustained five gunshot wounds. One was fired at a range of no more than three inches. Of the bullets which were recovered, balistics showed them to be fired by a pistol to which Petitioner had access.

David Harris testified that Petitioner was driving the car which had been stolen by Harris. When stopped by the police, Petitioner reached under the seat and produced a .22 caliber pistol which also had been stolen by Harris. Harris testified that Petitioner shot Wood five times. Harris' testimony was corroborated by a written statement from Petitioner (S/F 522) which recited substantially the same events as those recited by Harris. The major dissimilarity being a period of time which Petitioner could not remember. That time coincided with the time of the murder. Petitioner presented an alibi defense. He testified that he was in a hotel room with his sleeping mother at the time of the offense. Three witnesses were then called by the State in rebuttal to identify Petitioner as the driver of the car when it was stopped.

At the punishment stage of the trial testimony was introduced from two psychiatrists, both of whom testified that Petitioner suffered from sociopathic personality traits. The only evidence introduced by Petitioner on punishment was testimony from his mother that he was a "good son".

ARGUMENT AND AUTHORITIES

I.

THE EXCLUSION OF CERTAIN PROSPECTIVE JURORS DURING VOIR DIRE DID NOT VIOLATE THE HOLDING IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner claims that the excusal of nine specific veniremen violated his rights as set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968).

The overall thrust of Witherspoon v. Illinois, supra, is that veniremen may not be excluded "simply because they voiced general objections to the death peanlty or expressed conscientious or religious scruples against its infliction." Id. at 522. Witherspoon goes on to declare that the State may properly exclude those who make unmistakably clear that (1) they would vote against the death penalty regardless of the facts or circumstances or (2) they could not be impartial fact-finders as to guilt. Id. at 522.

At the time of this decision the statutory provisions gave the jury no rules or guidelines for determining the ultimate penalty. As a result, the Illinois statute, as

well as those of other states, was declared so arbitrary and capricious as to violate the United States Constitution. Moore v. Illinois, 408 U.S. 786 (1972); Furman v. Georgia, 408 U.S. 238 (1972).

Texas responded to the decision in Furman by providing legislation for capital punishment in five particulary aggravated classes of murders. Further, the Legislature decreed that a death sentence could by applied only after unanimous affirmative jury findings on three special issues which provided for consideration of the facts of the offense and the character of the indivicual offender. To insure that the jury would be an impartial fact-finding body, the Legislature additionally provided that "A prospective juror shall be disqualified from serving unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issues of fact." Sec. 12.31(b), Texas Penal Code.

The provisions of this statute not only incorporate the thrust of footnote 21 in the Witherspoon opinion, but go further in protecting the rights of the accused from being tried by a jury who would be influenced by bias or prejudice. A juror sworn under the provisions of §12.31(b) is one who has sworn to consider only the facts and evidence and not be influenced by any bias as to punishment.

A juror biased in favor of the death penalty is prohibited from service equally as one who is biased against the death penalty. The use of the statute as a means of disqualification, by either the defense or the State, is not unconstitutional. A venireman who believes literally in a biblical instruction of "a life for a life" would be disqualified as would a venireman who could not fairly consider the death penalty or be impartial in determining the facts presented in evidence. The Texas Court of Criminal Appeals

has recognized this and has reversed two death penalty convictions because the defendant was improperly denied a challenge for cause to a venireman who could not consider life imprisonment. See Smith v. State, 573 S.W.2d 763 (Tex.Crim App. 1978); Cuevas v. State, 575 S.W.2d 543 (Tex.Crim.App. 1978).

Venireman Francis Mahon (S/F 31-71) stated that she would be affected in her deliberations on fact issues by the ultimate penalty of death or life imprisonment. She further testified that if she had any doubt she would answer the questions in the negative. Mrs. Mahon was properly excluded not only under the provisions of Texas Penal Code §12.31(b), but also in that she would hold the State to a higher burden of proof by automatically voting no if there was any doubt.

Venireman Forrest J. Jenson (S/F 348-371) was excluded under the provisions of Art. 12.31(b). He also stated that a man would have to be proven guilty "beyond all reasonable doubt" before he could vote yes to these special issues. Further, counsel for Petitioner although making an objection to the exclusion of venireman Jenson, did not present the same grounds for that objection as are now urged. Absent a correct contemporaneous objection, the error as to Witherspoon error is waived. Boulware v. State, 542 S.W.2d 677 (Tex. Crim.App. 1976) cert. denied 430 U.S. 959 (1977).

Venireman Nelda Coyle (S/F 1017-1071) stated she did not want to be a juror on this case. She also stated that she did not know if she could be an impartial juror. Venireman Coyle was finally excluded under the provisions of Art. 12.31(b) when she could not state under oath that she would not be affected in her deliberations on any issue of fact.

Venireman White (S/F 1525-1566) stated initially upon questioning that she probably wouldn't vote for the death

penalty. (S/F 1543). After defense counsel was given an opportunity to rehabilitate the witness she became quite confused. Venireman White stated "It's not getting to me, this is all just going all over me." (R. 1555). Although at one point she stated that she felt she could put aside her feelings she then stated "I think I answered wrong. I think I have to go back the other way now." (S/F 1559). She ended the voir dire examination by stating that she would definitely be affected in her deliberations on fact issues by her knowledge of the range of punishment.

Venireman Curtis Williams (S/F 2571-2604) stated that "If I knew all three questions was going to kill a guy, I don't think I could answer them yes." (S/F 2595). He further stated that "I think I would be influenced by the death penalty." (S/F 2598). After further questioning by counsel for both parties he again stated that he would be affected in his deliberations by the punishment of death or life imprisonment. (S/F 2603).

Venireman Bobbie Andrews (S/F 2692-2730) stated that "My personal feeling is that I don't want to be a part of taking someone's life." (S/F 2727). The court immediately then asked her whether or not she could swear under oath that the mandatory punishment of death or life imprisonment would not affect her deliberations on any fact issue in the case. Venireman Andrews answered "I cannot do that." On the basis of those answers she was excused from the jury panel.

Venireman Anthony Giuffrida (S/F 4443-4464) stated that at the present time he did not feel he could ever vote for death. (S/F 4456). He went on to say that he would be affected in his deliberations by the fact that the death penalty was a possible punishment. His final answer to questioning was that "I don't think I could actually give it." (S/F 4461).

Venireman Penny McDonald (S/F 4492-4571) initially stated that she was opposed to capital punishment. She further stated that murder of a police officer is not one of the crimes that she could ever vote for the death penalty on. (S/F 4497). She also stated that if she felt there was mental illness involved, even if sanity was not an issue, that she could not give the death penalty. She finally stated that she could not take an oath that she would lay aside her preconceived feelings about the mandatory sentence. (S/F 4568).

Venireman Dorothy Riddle (S/F 4920-4947) stated that she did not believe she could put her feelings aside and answer fact questions without considering the punishment.

All of these veniremen by their answers to the questions showed that they could not be fair and impartial jurors who could objectively listen to the evidence and return a verdict.

The veniremen excluded in this case were properly excluded as were the veniremen who were excluded in Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. 2954 (1978). The veniremen in Lockett could not take an oath to "well and truly try this case . . . and follow the law". The convictions of the veniremen in that case were such that they could not take that oath knowing that a possibility existed in regard the capital punishment. If a venireman cannot be trusted to "abide by existing law" and "follow conscientiously the instructions" of the trial judge they are properly excusable from the venire. Boulden v. Holman, 394 U.S. 478 (1969).

It should also be noted that the State only used eleven (11) of its fifteen (15) statutory peremptory challenges.

Since all of the veniremen complained of in the case at bar were either unalterably opposed to capital punishment or could not take an oath to set aside their bias and preju-

dice and follow the law they were properly excluded and certiorari should therefore be denied.

II.

PETITIONER WAS NOT DENIED DUE PROCESS BY THE USE OF PSYCHIATRIC TESTIMONY DURING THE PUNISHMENT PHASE OF THE TRIAL.

Petitioner contends that under the Texas statutory punishment scheme psychiatric testimony does not constitute competent evidence upon which to predicate the imposition of the death penalty. He bases this argument on the due process clause to the Constitution and also on Addington v. Texas, ___ U.S. ___, 99 S.Ct. 1804 (1979).

The State was charged with proving beyond a reasonable doubt that the murder committed by the Petitioner was committed deliberately with the intent that a death would result and further that the Petitioner would continue to commit crimes of violence in the future.[1/] The jury had before it all of the evidence of the crime as well as the evidence presented from the two psychiatric witnesses. The evidence showed that Petitioner deliberately and with no justification fired five shots into Officer Wood. This type of crime is the type of crime that is generally considered such an outrage to society as to be deserving the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976). The psychiatric testimony which was presented showed that Petitioner exhibited sociopathic personality traits. These personality traits showed that Petitioner possessed the type of personality that was without conscience. The only evidence in mitigation presented by the Petitioner was testimony from his mother that Petitioner had been a "good son."

The evidence presented at both the trial in chief and at the punishment stage of the trial was more than sufficient

1/ Art. 37.071, Texas Code of Criminal Procedure.

to support the jury findings. Petitioner's reliance on Addington v. Texas, supra, is misplaced. Addington dealt with the standard of proof required in a civil commitment case. In the case at bar, the standard was that of beyond a reasonable doubt. Since the heavy standard of criminal cases was applied in the case at bar the risk of error to the individual was greatly minimized. It is unnecessary to evaluate the evidence to determine whether or not it was "competent". The standard to apply is wheher or not the evidence was sufficient to support the jury findings. That question has not been presented to this Court. Therefore, since the evidence was both competent and sufficient and the issue presented by Petitioner is not one in which certiorari is proper, Respondent respectfully asserts that certiorari should be denied.

III.

THE PROSECUTOR'S FAILURE TO DISCLOSE A PRIOR WRITTEN STATEMENT OF A STATE'S WITNESS DID NOT VIOLATE PETITIONER'S RIGHTS UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963).

Petitioner alleged that the prosecutor failed to reveal prior to trial, a written statement executed by one of the prosecution's witnesses.

Soon after the shooting of police Officer Wood, three witnesses gave written statements to police. One of these witnesses, Emily Miller, described the assailant as having about a three inch afro and of being either a Mexican or a very light-skinned black man. (Defendant's Ex. 17). Petitioner contends that since he is neither black nor of Mexican descent, this prior statement was relevant to the issue of Emily Miller's credibility and that the prosecutor improperly withheld the statement in violation of the rule of Brady v. Maryland, 373 U.S. 83 (1963).

Petitioner further argues that the Court of Criminal Appeals legally side-stepped the issue of the prosecutor's

alleged misconduct in failing to produce the statement, by applying state law and procedure to exculpate his omission. What Petitioner chooses to ignore is the Court of Criminal Appeals' evaluation of the written statement in light of the entire record, a procedure proscribed by this Court in the case of United States v. Agurs, 427 U.S. 97 (1976).

The record reveals, that prior to trial, Petitioner's counsel filed a motion for the disclosure of evidence favorable to the accused. In that motion he asked for, among other things, the statements of witnesses. At a pretrial hearing the trial court asked the prosecution if the state had access to anything which would go to show the innocence of the defendant or that would be inconsistent with the theory of the defendant's guilt. The prosecutor stated he did not. (S/F 25). Three days after Emily Miller testified and after defense counsel had waived her further appearance, the defense counsel asked the prosecutor to see the written statements of the three identification witnesses. At this point in the trial, both sides had rested and Emily Miller was no longer available to testify. The trial court denied counsel's request to introduce her prior written statement into evidence.

Under Texas law a defendant is entitled to examine the written statement of a witness for purposes of cross-examination, upon demand made after the witness has testified on direct examination. Gaskin v. State, 353 S.W.2d 467 (Tex.Crim.App. 1961). In addition, Art. 39.14, V.A.C.C.P. specifically excepts written statements of witnesses from pre-trial discovery. A defendant is, therefore, entitled to examine the prior statements of a state's witness only if he makes a timely and specific request to do so following the witness' direct testimony.

Petitioner's attorney did not request to see Emily Miller's written statement until three days after she had testified. Petitioner attempts to excuse his untimely request by laying the blame to the proseuctor's earlier pretrial statements that he did not have exculpatory material in his file. Respondent submits that Petitioner's counsel was aware of his duty to ask whether any prior statements had been made his oversight in failing to do so cannot now be shifted to the prosecution.

Even if the prosecutor's omission in producing Emily Miller's statement during the pretrial proceedings was in any way error, such error would be harmless beyond a reasonable doubt since Emily Miller's testimony during the case-in-chief was substantially the same as her written statement.

During a hearing, outside the presence of the jury, Emily Miller testified that Petitioner could be either a Mexican or a very light-skinned black man. (Tr. 1086). Upon re-direct, the defense counsel never questioned Emily Miller regarding her statements concerning Petitioner's race; at no time did he challenge or object to her identification of the Petitioner. Instead, defense counsel waived further appearance of Emily Miller. (Tr. 1092). Apparently Petitioner's counsel attached no great significance to Emily Miller's observations of the possibilities of Petitioner's race. The overwhelming evidence of Petitioner's guilt and Emily Miller's positive and unequivocal identification of Petitioner, accounts for the absence of an objection. E.g. Wainwright v. Sykes, 443 U.S. 72 (1977).

Further, it should be stressed that Emily Miller was only one of three identification witnesses. Her statement describing the suspect as a black or Mexican man was based on having seen the assailant for a few seconds as she and

her husband drove past the scene. The record does reveal, however, that she positively identified Petitioner in both a lineup and a photographic display as did the other two witnesses.

Petitioner relies on this Court's holding in Brady v. Maryland, supra, to support his contention that the prosecutor's omission of the written statement during pretrial proceedings deprived Petitioner of due process. This Court held in United States v. Agurs, supra, that unless a prosecutor's omission deprived a defendant of a fair trial, there is no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there is no breach of a prosecutor's constitutional duty to disclose. United States v. Agurs, supra, at 108. Furthermore, constitutional obligation is not measured by the moral culpability, or the willfulness, of a prosecutor. Brady v. Maryland, supra; Mooney v. Holohan, 294 U.S. 103 (1934).

Implicit in Brady and in Agurs, is that the fact that not only must there be a specific request for a statement but that the statement must be "material." (Emphasis added). Brady v. Maryland, supra at 87; United States v. Agurs, supra. The question of whether a statement is "material" rests on the determination of whether the suppressed evidence might have affected the outcome of the trial. Brady v. Maryland, supra. This Court has held that the prosecutorial omission such as in Petitioner's case, must be evaluated in the context of the entire record -- the very procedure followed in this case by the Texas Court of Criminal Appeals. United States v. Agurs, supra, at 112. If there is no reasonable doubt about guilt, as the Court of Criminal Appeals concluded in Petitioner's case, whether or not the additional evidence is considered, there is no justification for a new trial. Respondent submits that in view of the evidence and testimony at Petitioner's trial, including Emily Miller's

unchallenged testimony at the sub rosa hearing, and in view of this Court's observations in Brady and Agurs, the prosecutor's nondisclosure of Emily Miller's prior written statement can only be characterized as harmless under the customary harmless-error standard. The Court of Criminal Appeals has faithfully followed the dictates of this Court in Petitioner's case regarding the prosecutor's omission in furnishing a witness's pretrial statement.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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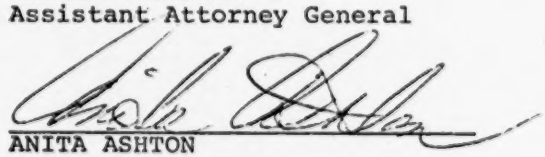

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